Supreme Court of the United States

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American [illegible] Company, a Corporation,
Appellant,

vs.

Railroad Commission of the State of California, [illegible], as Members of and Constituting the Railroad Commission of the State of California, Appellees.

REPLY BRIEF OF APPELLANT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 704.

AMERICAN TOLL BRIDGE COMPANY, a Corporation,
Appellant,

v.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, WALLACE L. WARE, FRANK R. DEVLIN, RAY L. RILEY, RAY C. WAKEFIELD and LEON O. WHITSELL, as Members of and Constituting the Railroad Commission of the State of California, *Appellees.*

REPLY BRIEF OF APPELLANT.

This reply brief is being filed in accordance with the provisions of Rule 27 (5) of the Revised Rules of this Court.

We shall consider the issues in the order in which we stated them in our opening brief and shall reply to the brief for appellees in connection with each such issue.

Unless otherwise specified, italics herein are ours.

I.

IMPAIRMENT OF CONTRACT OBLIGATIONS.

In our opening brief, we showed—

(1) That the Carquinez Bridge was constructed and is being operated under the provisions of Ordinance No. 171 of the board of supervisors of Contra Costa County, California;

(2) That said ordinance is a contract between the State of California, acting through said board of supervisors, and appellant (*County of Contra Costa* v. *American Toll Bridge Company,* 10 Cal. (2d) 359);

(3) That there are read into said contract as a part thereof, the applicable provisions of the Political Code of California relating to grants of franchises for the construction and operation of toll bridges, including particularly Sections 2845 and 2846 of said Political Code; and

(4) That appellant and appellees have *agreed* as to the meaning of the language of said last-mentioned sections.

In the words of our opponents, with which we have heretofore announced agreement (R. 150-1):

> *"It may be conceded that the intent of section 2845(3), when read together with section 2846, and in the light of the earlier statutes, is that the boards of supervisors should not at any time during the life of the franchise * * * so reduce the tolls as to fail to yield the grantee a return of 15 per cent on the cost of construction or on some other valuation of the property exclusive of the franchise itself."*

This does not mean that appellant is at any time entitled to *increase* the existing tolls so as to increase the net income to 15 per cent. But the parties are agreed that the words of said Sections 2845 and 2846 mean that the board of supervisors may not at any time *reduce* the existing tolls unless the board has first found that the return is exceeding 15 per cent.

Accordingly, the following question arises—

> Are the words of said Sections 2845 and 2846, when read into the contract, the words of *contract* or are they the words of *regulation?*

If they are the words of *contract,* as we believe them to be, then appellant's contract has been unlawfully impaired.

On the other hand, if, as contended by appellees, they are words of *regulation,* then they constitute the *unrepealed* and presently effective *rule or standard* of *rate-making* prescribed by the Legislature for application to the rates of toll bridge companies. In that event, it was the duty of the Railroad Commission to apply said words in the present case, and the Commission's failure to do so denied to appellant precedural due process of law.

In either event, the judgment herein must be reversed.

We shall now make specific reply to the points set forth in the brief for appellees on the issue of impairment of contract obligations.

1. Preliminary Errors of Appellees.

At the very outset, appellees commit an inexplicable error. They say (Brief, p. 6):

> "But let it be made entirely clear that it is not such franchise itself which appellant asserts to constitute a rate contract."

The same error is subsequently repeated (Brief, p. 27):

> "* * * for appellant does not contend that the franchise itself purports to be or constitutes the alleged contract."

We thought that we had made it abundantly clear that the contract on which we rely is the contract evidenced by the franchise ordinance (No. 171) into which are read and become a part thereof the applicable provisions of the Political Code relating to grants of toll bridge franchises, including particularly the provisions of said Sections 2845 and 2846. We do not understand the error of appellees in this respect.

Continuing, appellees say (Brief, p. 6):

> "That franchise (R. 269-277), it is true, did mention the rates to be charged, but the franchise also declared that the Railroad Commission should fix the rates."

As we pointed out in our opening brief (p. 24):

> "In connection with the rate of tolls, the ordinance provided that the same should be fixed by the Railroad Commission but that in the event that the Railroad Commission failed to do so, the tolls to be collected should be those set forth in detail in the ordinance. The Railroad Commission did not fix the tolls. The provision for such action by the Railroad Commission was obviously void for the reason that the Board of Supervisors and the grantee of the franchise could not, by any agreement between themselves, confer upon the Railroad Commission a jurisdiction which it did not have. The Legislature had (a) conferred that

jurisdiction upon the Board of Supervisors and (b) failed to confer it upon the Railroad Commission. For both of these reasons, said franchise provision was void."

The Railroad Commission has itself continuously taken the position that the above provision of the franchise ordinance was and is void. In fact, in its decision (R. 32-3) the Commission states that the jurisdiction claimed by it was acquired by the Act of July 1, 1937, effective August 27, 1937 (see Opening Brief, Appendix No. 2).

Why the matter should be referred to now is not apparent to us.

Appellees next say (Brief, p. 7) that the particular contract rights on which appellant relies are claimed by appellant to exist throughout the franchise period of *25* years. This statement is likewise an error. The period during which the contract limitation on which appellant relies will remain effective is only *20 years* (Political Code, Section 2846) and will expire on or about March 5, 1943. As a matter of fact, bearing in mind that while the effective date of Ordinance No. 171 was March 5, 1923, the time when appellant could begin to charge the tolls specified therein did not commence until the Carquinez Bridge was opened for traffic on May 21, 1927, the effective period of the contract right claimed by appellant was only approximately 16 years. We do not believe that any one can fairly urge that this is an unreasonable period of time.

On page 8 of their brief, appellees say that said Sections 2845 and 2846 of the Political Code "remained unchanged since the time of the adoption of the Codes in 1872." In the interest of accuracy and to avoid the possibility that some member of the Court might unwittingly be misled by said statement, we point out

that while said statement is accurate as to Section 2846, it is inaccurate as to Section 2845. That section was amended, in relatively minor respects, in 1923, subsequent to the effective date of appellant's Carquinez and Antioch Bridge franchises (St. 1923, p. 288).

To us, the significant fact in connection with said amendment is that when reviewing the matter as late as 1923, only 16 years ago, the Legislature retained the 15 per cent provision on which we rely.

2. The Intent of the Legislature to Authorize and to Grant Contract Rights Appears from the Legislative History of Toll Bridge Construction and Operation in California.

On pages 30 to 39 of our opening brief, we traced the history of the legislative regulation of toll bridge construction and operation in California from 1850 to the enactment of the Codes in 1872. We there showed the evolution of legislative regulation through three stages, beginning with regulation without any limitation in the fixing of tolls and finally evolving into definite *contract limitation* on the regulatory authorities, so as to give definite contract protection to the grantees of toll bridge franchises.

We there showed that Sections 2845 and 2846 of the Political Code are merely a recognition of the evolution of toll bridge franchise regulation from the earlier unlimited right of the boards of supervisors to fix such tolls as they might please to the later limitation of such right by appropriate *contract* protection accorded to the grantees of the franchises.

We are pleased to note that appellees (Brief, pp. 10-12) quote the language on which we rely from a number of the statutes enacted during the last of the said three stages. In so quoting, appellees apparently con-

cede that during said third stage, just prior to the enactment of the Codes in 1872, the Legislature did accord to the grantees of toll bridge franchises substantial protection in the form of *contract limitation* on the authority to regulate the tolls. The point of appellees seems to be that the details of that contract protection were changed in 1872.

Appellees seem to contend that the contract protection prior to 1872 was a guaranty of a specified *minimum* return on a specified rate base but that when Sections 2845 and 2846 of the Political Code were enacted in 1872, that protection was changed to read that the grantees of toll bridge franchises might retain the revenues from the tolls originally written into the franchise ordinance unless and until the net income might exceed 15 per cent on the designated rate base.

But this is a mere change in the details of the contract protection accorded and not a change in the general policy of giving protection to the grantees of toll bridge franchises by a definite contract limitation on the power of regulation.

However, even the protection accorded in 1872 embodies the right to a certain *minimum*, namely, the right to retain the revenues from the tolls first inserted into the franchise ordinance unless and until those tolls should thereafter yield a return in excess of a *maximum* of 15 per cent. In that event, the rights of the public step in and are protected by the provision that the board of supervisors may reduce the tolls so that the net income shall not exceed 15 per cent.

There is thus a clear continuation of the definite policy of contract protection by the establishment of a *contract limitation* or the continuing power of regulation.

In *Los Angeles* v. *Los Angeles City Water Company*, 177 U. S. 558, there was a quite analogous provision that the city council reserved the right to regulate the water rates subject, however, to the proviso

> "that they shall not so *reduce* such water rates, or so fix the price thereof, *to be less than those now charged by the parties of the second part for water.*"

The Court, speaking through Mr. Justice McKenna, held that said provision was a valid *contract limitation* upon the power of regulation. At page 570, the Court said:

> "We think, therefore, the power to regulate rates was an existent power, not granted by the contract, but reserved from it, with a single limitation—the limitation that it should not be exercised to reduce rates below what was then charged. *Undoubtedly, there was a contractural element; it was not, however, in granting the power of regulation but in the limitation upon it.*"

Likewise, what we have in the present case is a definite contract limitation on the general, continuing power of the board of supervisors (and of the Railroad Commission now standing in the shoes of the board of supervisors) to regulate the tolls of toll bridge companies.

What the Legislature did in said third stage, just prior to 1872, and what it did in enacting said Sections 2845 and 2846 of the Political Code in 1872, both show the *intention* of the Legislature to accord *contract protection* to the grantees of toll bridge franchises, by establishing a definite *contract limitation* upon the general power to regulate the tolls. The only difference between the legislation of the two periods is a slight dif-

ference in the details as to the exact terms of the contract protection accorded.

On pages 13-14 of their brief, appellees express a number of conclusions on the subject of the legislative intent.

Appellees first say that there is a clear legislative intent to subject toll bridges to continuing regulation as to their tolls. We agree with said statement if there be added the proviso that said regulation is subject to the definite contract limitation on which we rely.

Appellees next say that the Codes of 1872 do not prescribe a definite method for ascertaining the "base value" upon which the rate of return is to be calculated. We perceive no particular difficulty in this matter. Section 2845(3) of the Political Code specifies that for the first year the return shall be computed "on the actual cost of the construction or erection" and in succeeding years on "the fair cash value." To any one experienced in the regulation of public utility rates, those bases would appear to be sufficiently definite.

Appellees then express the further conclusion (Brief, p. 14) that there is no evidence to show that the return of 15 per cent mentioned in the Code "was intended to place toll bridges in a class set apart from other grantees of public franchises."

In making this statement, appellees have apparently overlooked the fact that ever since the early 50's toll bridge regulation in California has been in a class by itself. As the Supreme Court of California said in *Newsom* v. *Board of Supervisors of Contra Costa County*, 205 Cal. 262, 266:

> "In other words, toll-bridge regulations have been from the early history of the state and now are in a class by themselves."

In other words, toll bridge companies have, for the purpose of regulation, been treated by the Legislature as in a class by themselves and such classification has never been deemed to be special legislation or for any other reason unlawful.

On the subject of legislative intent, we believe it to be clear from what the Legislature did both before 1872 and in 1872 that it intended to and did grant to the grantees of toll bridge franchises contract protection in the nature of a *contract limitation* upon the general power of regulation.

3. The Plain Meaning of the Language is that of Contract.

On page 12 of the brief of appellees, appears this heading:

> "The language of the code sections is that of regulation and not of contract."

However, the material under that heading relates solely to "legislative intent", which matter we have already discussed.

Appellees do not undertake to reply to that portion of our opening brief which appears on pages 39 to 46 under the heading

> "An analysis of the language of the contract shows the rights claimed by appellant."

To that analysis, the Court is respectfully referred.

4. There is Nothing in the Constitution of California Which Prohibits the Legislature from Making or Authorizing the Making of Contracts Such as that Here Under Consideration.

On page 14 of their brief, appellees assert that "even assuming a legislative attempt to permit counties to

enter into rate contracts, the Legislature was prohibited by constitutional mandate from granting such authority."

Appellees cite three provisions from the California Constitutions of 1849 and 1879, but not one of them supports their claim.

Sections 31 of Article IV of the Constitution of 1849 read as follows:

> "*Corporations* may be *formed* under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed *pursuant to this section* may be altered from time to time, or repealed."

Section 1 of Article XII of the Constitution of 1879 reads as follows:

> "*Corporations* may be *formed* under general laws, but shall not be created by special act. All laws now in force in the state concerning corporations, and all laws that may be hereafter passed *pursuant to this section,* may be altered from time to time or repealed."

As will be noted, both sections refer to the *formation of corporations,* and the reserved power to alter or repeal is made applicable only to laws passed "pursuant to this section," *i. e.,* laws relating to the *formation of corporations.*

These provisions have no application to the present situation. Sections 2845 and 2846 of the Political Code have nothing to do with the formation of corporations. They refer to the entirely different question of grants of franchises for the construction and operation of toll bridges. Such franchises may as well be granted to *individuals* or *partnerships* as to *corporations.*

The issue of impairment of contract obligations herein under consideration is in no way dependent on the fact that the grantee of this particular franchise happened to be a *corporation*. The issue would be exactly the same had the grantee been a *partnership* or an *individual*.

The present case involves no attempt to alter or repeal any provision of the articles of incorporation of American Toll Bridge Company.

The statement of appellees (Brief, p. 14) that "the Supreme Court of California, in the judgment here appealed from, held * * * that the State Constitution expressly reserved a right in the Legislature to repeal or alter *such* laws, the court referring to Article IV, Section 31 of the Constitution of 1849, and to Article XII, Section 1 of the Constitution of 1879," is correct if applied to laws relating to the *formation of corporations*, but the statement of appellees is not correct if applied to Sections 2845 and 2846 of the Political Code.

What the Supreme Court of California actually said was (R. 131):

> "The reservation of the power to repeal or alter the law (Const. art. IV, sec. 31, now art. XII, sec. 1), has been held to enter into the contract with the corporation."

The law there referred to was, of course, the law providing for the *formation of the corporation*.

Nor does appellees' claim find any more support in Section 21 of Article I of the Constitution of 1879, from which appellees quote as follows (Brief, p. 15):

> "No *special* privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature, * * *."

This provision was not even referred to by the Supreme Court of California, and appellees cite no authority of any kind to show that it has any bearing on the present situation.

As the Court will observe, the provision relates only to the grant of "*special* privileges or immunities." The language is quite different from that frequently found in State Constitutions or Bills of Rights and reading as follows (See *Louisville and Nashville Railroad Company* v. *Garrett*, 231 U. S. 298):

> "Every grant of a franchise, privilege or exemption shall remain subject to revocation, alteration or amendment."

Referring specifically to the granting of *franchises*, it has always been held in California that the grant of a franchise is not the grant of a "special" privilege and does not fall within the language of Section 21 of Article I unless it is "exclusive" or "monopolistic."

Thus, Section 536 of the Civil Code of California grants franchises to telegraph and telephone companies: but because such franchises are *not exclusive* they do not violate Section 21 of Article I of the Constitution and are not grants of a "special" privilege.

> *Western Union Telegraph Company* v. *Hopkins*, 160 Cal. 106, 122;
> *Postal Telegraph-Cable Company* v. *Railroad Commission of California*, 200 Cal. 463, 472.

In other jurisdictions, it has been held, in harmony with our position, that the grant of a franchise containing provisions for the construction of a plant, system or works by a public utility and specifying also the rates to be charged, is not the grant of a "special privilege or immunity" under constitutional provisions con-

taining that language, where such franchise was *not exclusive or monopolistic.*

Omaha Water Co. v. *City of Omaha,* 147 Fed. 1, 6-7;
Omaha Electric Light & Power Co. v. *City of Omaha,* 172 Fed. 494, 496;
Water, Light & Power Co. v. *City of Hot Springs,* 274 Fed. 827, 835.

We believe it clear that Section 21 of Article I of the Constitution of California cannot properly be held to be applicable to the contract here under consideration. It is not an exclusive or monopolistic contract and it was entered into under provisions of the Political Code which were equally applicable to all corporations, partnerships or individuals who might make application for toll bridge franchises.

The Supreme Court of California did not find that Article I, Section 21, of the Constitution of California has anything to do with the present case and we shall not pursue the subject further.

There is no merit in the claim of appellees that there is any provision in the Constitution of California which prohibits the Legislature from authorizing or itself entering into the contract here under consideration.

5. The Decisions of This Court Show That Appellant's Position is Correct.

On pages 16-22 of their brief, appellees quote from *Spring Valley Water Works* v. *Schottler,* 110 U. S. 347, and *Stanislaus County* v. *San Joaquin and Kings' River Canal and Irrigation Company,* 192 U. S. 201. However, neither of these cases is in point, for the reason that the statutory provisions there under consideration were each *part of the very statute under*

which the corporation was incorporated and *formed part of the corporation's corporate powers* under said statute.

Under its reserved power to alter or repeal all statutes enacted under the two provisions of the Constitution of California hereinbefore quoted and referring to the formation of corporations, the State, of course, had power to alter or repeal the specific statutory provisions at issue in those two cases.

It is a very different matter to attempt, in reliance on the power to repeal or alter a corporation's charter or articles of incorporation, to deprive a corporation of "rights and interests acquired by the company, not constituting a part of the contract of incorporation." That can not constitutionally be done.

Railroad Company v. *Maine*, 96 U. S. 499, 510.

The Court is respectfully referred to pages 52 to 58 of our opening brief, where we make a careful analysis of both the *Spring Valley Water Works* and the *Stanislaus County* cases and show that neither case supports the position of appellees.

On page 23 of their brief, appellees cite *Home Telephone and Telegraph Company* v. *City of Los Angeles*, 211 U. S. 265, and *Railroad Commission* v. *Los Angeles Railway Corporation*, 280 U. S. 145. The Court is respectfully referred to pages 58 to 61 of our opening brief, where we analyze these cases. In each case, the Court held that on their specific facts, including the specific statutory provisions there deemed relevant, the State of California had not conferred on the City of Los Angeles (a political subdivision of the State) the authority to make the specific rate contracts there claimed. The Court fully recognized the *power* of the

State to grant such authority but found that on the *facts* the authority had not there been granted.

The question here is quite different. The State here had clearly conferred on the County of Contra Costa authority to enter into a franchise contract. There is no question here as to whether the State had authorized a political subdivision to write into the contract the crucial words in the present case, for the reason that said words were *not* written into the contract by the Board of Supervisors. *They were written into it by the State itself, acting through its Legislature.* The Board of Supervisors had nothing to do with said words. They were written into the contract by the State itself and were provided for when the State enacted said Sections 2845 and 2846 of the Political Code.

Hence there is here involved no question as to whether or not the State had delegated to a political subdivision the authority to write words of contract into a franchise ordinance.

The State's authority to do what the State here did can not be successfully challenged.

On page 23 of their brief, appellees cite but do not quote from *Lorenz* v. *Stearns,* 85 N. H. 494, 161 Atl. 205 (appeal dismissed and certiorari denied in *Stearns* v. *Lorenz,* 287 U. S. 565). The question there at issue was whether the Public Service Commission of New Hampshire had authority to reduce the tolls of a toll bridge constructed under authority of a statute of 1901. The statute set forth the tolls to be charged.

By an earlier statute of 1891, the State had reserved to itself the power

> "to alter, amend or repeal the charter of any corporation, or the law under which it was established, *or may modify or amend any of its franchises, duties or liabilities.*"

The Court will note the reservation of the specific right to modify or amend any *franchise* owned by the corporation—a matter quite different from the power to alter or repeal a corporation's charter or its articles of incorporation. In view of that reservation of power, the court, quite naturally, held that the State could later alter the tolls. The court's conclusion was as follows (p. 211):

> "The conclusion arrived at is that the provision in the Act of 1901 was a mere regulation of the tolls to be charged, and that if it could be construed as a grant of right it was a *franchise, repealable under the reserved power of the state.* It was not an irrepealable contract entered into on behalf of the state."

In several passages of its decision, the court there referred to the undesirable situation which would exist if it be held that the owner of the franchise had a *perpetual* right to exact tolls as he pleased. In this respect, also, the case is quite different from ours, in which the claimed contract limitation could not, in any event, extend beyond *20* years and, in fact, will be in practical operation for not to exceed *16* years.

On page 24 of their brief, appellees cite *Shields* v. *Ohio,* 95 U. S. 319, and a number of other cases in support of the proposition that the state may, by constitutional provision, reserve the power to alter or repeal "laws respecting franchise privileges." Conceding that statement to be correct, it is, nevertheless, necessary to put the finger on a specific constitutional provision which has that effect. As we have already shown, there is no provision in the Constitution of California by which the State has reserved the power to alter or repeal a franchise acquired subsequent to the forma-

tion of a corporation and authorizing the construction and operation of works for supplying a public utility service.

Accordingly, none of said decisions cited by appellees are in point here.

It is, of course, true, as was said by the Court in *Milwaukee Electric Railway & Light Co.* v. *Railroad Commission of Wisconsin*, 238 U. S. 174, that this Court will give all proper weight to the judgment of a state court which, in deciding a case of alleged impairment of contract obligations, has construed a state statute (Brief, p. 25). However, as we pointed out in our opening brief (p. 19), the independent examination which the Court makes in such cases is just as applicable where part or all of the contract consists of a state *statute* which was construed by the state court, as is the case where no statute is involved.

Indiana v. *Brand*, 303 U. S. 95, 100;
Coombes v. *Getz*, 285 U. S. 434, 441;
Freeport Water Company v. *Freeport City*, 180 U. S. 587, 595, 610;
Walsh v. *Columbus, Hocking Valley and Athens Railroad Company*, 176 U. S. 469, 475;
Jefferson Branch Bank v. *Skelly*, 1 Black (66 U. S.) 436, 443.

We do not consider it necessary to re-state the numerous decisions of this Court and other Federal courts recognizing the authority of the legislature to make, or to authorize the making of, contracts containing definite public utility rates or fares which could not be changed by public authority, during a specified reasonable time, or only if the yield should become greater than the one specified in the contract, and found that on the facts of the case such contract had been lawfully entered into.

For some of the leading decisions, the Court is re-

spectfully referred to pages 65-70 of our opening brief.

However, because of its close analogy to the facts of the present case and because it establishes the precise legal principle which we believe to be here applicable we desire to refer again, for a moment, to *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558. In that case, as the Court will remember, the ordinance provided, in part, that the city council reserved the right to regulate the water rates but contained a proviso that the council should not reduce the water rates below the rates then in effect (p. 570). In upholding this contract limitation, this Court, speaking through Mr. Justice McKenna said (p. 570):

> *"Undoubtedly there was a contractual element; it was not, however, in granting the power of regulation, but in the limitation upon it."*

Appellees seek to distinguish said case on the ground that the Legislature there had enacted a statute ratifying the contract (Brief, p. 27). *But that is exactly what was done in our case.* We ask the Court to turn to page 28 of our opening brief, where we quote in full the ratifying Act of May 8, 1923 (St. 1923, ch. 131, p. 272). As we there point out, this statute was enacted only two months subsequent to the effective date of said Ordinance No. 171 and expressly ratified all franchises theretofore granted for the construction of toll bridges across specified waters including *"Carquinez Straits."*

At page 26 of their brief, appellees seek to minimize the effect of said ratification by alleging that the *motive* of the ratification was to remove some doubt as to the *duration* of the Carquinez Bridge franchise. However, there is nothing in the language of the ratifying statute or in the record in this case to justify that statement nor have we ever before heard any such comment. Even

if so, we submit that a ratification is a ratification and that its effect is not to be questioned because of the reason which may have animated somebody in urging it.

The simple fact is that appellant's franchise was ratified by the Legislature of California, just as was that of Los Angeles City Water Company, and that the sole ground on which appellees seek to distinguish *Los Angeles* v. *Los Angeles City Water Co., supra,* is shown to be without merit.

In closing our reference to the authorities bearing on the issue of impairment of contract obligations, we must express our surprise at the claim of appellees (Brief, p. 27) that the Supreme Court of California did not in *County of Contra Costa* v. *American Toll Bridge Company,* 10 Cal. (2d) 359, hold that Ordinance No. 171 constituted a binding contract. The contention is so obviously without merit that we shall merely ask the Court to read the decision and our reference to it on pages 28 to 30 of our opening brief.

We believe that we have now answered each point made in the brief for appellees on the issue of impairment of contract obligations. We submit that it appears very clearly that the Railroad Commission's order impaired the obligation of appellant's contract, for the reason that the Commission undertook to *reduce* appellant's tolls although the record showed without dispute and the Supreme Court of California found (R. 128) that at no time has appellant received a return of anywhere near 15 per cent.

We believe that the Court need go no further in this case and that on this ground alone the judgment herein should be reversed.

II.

Procedural Due Process.

We shall now reply to the brief of appellees on the issues of Procedural Due Process.

A

THE PROCEDURE OF THE RAILROAD COMMISSION CONSTITUTED A DENIAL OF DUE PROCESS OF LAW UNDER THE PRINCIPLES MOST RECENTLY STATED BY THE COURT IN MORGAN v. UNITED STATES, 304 U. S. 1.

We understand the decision in the *Morgan* case to hold that in a quasi-judicial proceeding instituted by the Government against a public utility it is the duty of the Government, in some appropriate way, to advise the party against whom the Government is proceeding "of what the Government proposes" and to give him a fair opportunity "to be heard upon its proposals before it issues its final command".

In ascertaining whether or not that requirement has been met, the Court naturally asks itself the following questions:

Were the issues defined in the usual way by complaint and answer?

If not, did counsel for the Government advise what the Government proposed by some statement at the hearing or in oral argument?

If not, did counsel give the requisite information in a brief?

If not, did the administrative tribunal serve proposed findings or an intermediate report?

If not, did the Government, in any other way, announce "its proposals before it issues its final command?"

In the *Morgan* case, the Government had done none of these things. In the case now before this Court, the Railroad Commission did none of them. On this issue of procedure, the two cases are completely identical.

The Court will find our analysis of the *Morgan* decision and its application to the facts of the present case fully set forth on pages 75 to 86 of our opening brief.

In reply, appellees make a response of only two paragraphs (Brief, pp. 28-9).

Either directly or by failure to reply, appellees admit as follows:

(1) Here, as in the *Morgan* case, the proceeding was instituted by a mere order or notice of inquiry;

(2) Here, as in the *Morgan* case, no charge or complaint, either formal or informal, was ever filed;

(3) Here, as in the *Morgan* case, there being no complaint, no answer was or could be filed and no issues were ever defined by any pleadings;

(4) Here, as in the *Morgan* case, the State did not make known what it proposed, by any oral argument or by any brief setting forth such proposals;

(5) Here, as in the *Morgan* case, the State at no time prior to the decision, ever advised appellant of what it proposed to do, by means of proposed findings, or intermediate report; and

(6) Here, as in the *Morgan* case, *by no means whatever,* did the State ever advise appellant "of what the Government proposes" or give appellant a fair or any opportunity "to be heard upon its proposals before it issues its final command."

We see no escape from the conclusion that the principle of the *Morgan* case applies exactly to the facts of the present case.

Appellees seek to escape the effect of the decision by referring, without citation of supporting authority, to a number of matters which, in our opinion, are irrelevant or furnish no defense. The facts that a notice was given and a hearing held and evidence received and a decision rendered and a review provided do not furnish an answer to the principle in the *Morgan* case. Those things all happened there, also.

The fact that appellant did not insist that all the requirements of procedural due process be complied with is immaterial. How could appellant know that before the decision was rendered the Commission would not at some time and in some way advise appellant "of what the Government proposes?" How could appellant know that, even in the 24th hour, the Commission would still fail to afford appellant an opportunity "to be heard upon its proposals before it issued its final command?" The requirements of procedural due process are certainly not conditioned upon anticipation by the citizen of their violation. An administrative tribunal can not in any such way defend against its own failure to meet those requirements.

Appellees say that appellant waived the opportunity to argue or brief the case. What of it? By oral argument or brief, appellant could not possibly have advised itself "of what the Government proposes" and thus be heard upon the Government's proposals before the final command is issued. That duty rested upon the Commission and not upon appellant.

Appellees further say (Brief, p. 29) that they "can discover no allegation anywhere that appellant did not know exactly what the issues were." We do not understand how appellees can make that statement. They know full well that appellant has continuously insisted that it did not know what the issues were and that at

no time prior to the Commission's decision did it have any means of knowing.

Appellant, of course, knew that it was being investigated but it had no means of knowing where the lightning would strike.

The notice of inquiry (R. 30) provides in the most general terms, for an investigation "into the reasonableness of the *rates, charges, contracts, classifications, rules and regulations, or any thereof,* now charged or enforced by American Toll Bridge Company in the operation of" the Carquinez Bridge.

Whether the investigation and the final order would relate to appellant's fares for passengers or for the various types of passenger vehicles or to appellant's rates for freight or to the trucks transporting the same or to appellant's contracts or to its classifications of passengers or commodities, or to its rules and regulations, or to which thereof, appellant had no means of knowing.

Testimony was introduced as to tolls charged by appellant for automobiles, both on a cash and a commutation basis and for P.W.A. employees; for auto stages for trucks; for passengers in various vehicles and on foot; and for freight. A Commission witness testified at length concerning appellant's accounts. In not one of these matters, was appellant advised as to the Commission's proposals. There was nothing except testimony by witnesses not authorized to speak for the Commission and appellant's testimony in response.

The decision, when rendered, related to only two of the above matters, namely, the tolls for passengers on foot or in vehicles and non-commutation tolls for automobiles. But how was appellant to know what matters were to be covered? And the tolls actually established had not been even once mentioned by any one at any

time during the course of the hearing or prior to the decision.

We conclude that appellee's defenses are unavailing, that the case is a clear case for the application of the principle of the *Morgan* case and that the denial of procedural due process is patent.

We also submit, very respectfully, that this would be an appropriate case for a declaration by the Court that the principle of the *Morgan* case, announced in a case relating to action by a *Federal* administrative officer, is equally applicable to the proceedings of *State* administrative tribunals or officers and that, on this ground alone, the judgment must be reversed if the Court deems it necessary or desirable to look beyond the issue of the impairment of contract obligations.

B.

THE PROCEDURE OF THE RAILROAD COMMISSION CONSTITUTED A DENIAL OF DUE PROCESS OF LAW BECAUSE THE COMMISSION FAILED TO MAKE FINDINGS AS TO FAIR VALUE OR A PROPER RATE BASE AND TO MAKE ANY OF THE OTHER NECESSARY BASIC OR ESSENTIAL FINDINGS.

In our opening brief (pp. 86-99), we first drew attention to the decisions of the Court holding that it is the duty of administrative tribunals to make "the basic and essential findings required to support" their orders. Referring specifically to public utility rate cases, we cited (p. 90) *United Gas Public Service Co.* v. *Texas*, 303 U. S. 123, in which case this Court held that procedural due process requires the findings which are there specified.

Turning then to the Railroad Commission's decision in the present case, we pointed out that the Commission failed to make any of the basic and essential findings required in a public utility rate case.

Specifically, we pointed out that

(1) The Commission failed completely to make any finding as to the fair value of the property or the proper rate base;

(2) While the order purports to establish a rate for 1938, there is no finding as to what gross revenue the rate established by the Commission will produce in 1938 or in any subsequent year;

(3) There is no finding as to the reasonable amount of maintenance and operating expenses and taxes to be paid in 1938 or in any subsequent year;

(4) There is no finding as to a reasonable and proper allowance for depreciation or depletion in 1938 or in any subsequent year;

(5) There is no finding as to how many dollars will remain in 1938 or in any subsequent year for return on the fair value of the property; and

(6) There is nothing whatever in the decision to show that the rates established by the Commission will yield even a return of 7.5 per cent on the fair value of the property or on a proper rate base.

The entire matter is left to speculation and conjecture and the Court is called upon, in the absence of any findings by the Commission, to do the fact-finding work which it was the Commission's duty to do.

We concluded that the Commission's failure to make said findings constituted plain denial of the requirements of procedural due process.

Appellees merely make, in two short paragraphs (Brief, p. 29), what appears to us to be an ineffective plea in confession and avoidance.

They say that it is "not *alleged* that appellant has suffered any *disadvantage*" from the failure of appellees to make the findings and, anyway, that such failure "cannot be a failure of due process in a procedural sense."

The "disadvantage" both to this Court and to appellant is too obvious to call for comment.

While appellees say (Brief, p. 29) that they will make further reply while discussing the issue of confiscation, they nowhere in that discussion show that the Commission made the basic and essential findings to the absence of which we have drawn specific attention.

As the Commission completely failed to make findings on the fair value or any rate base and to make the other necessary basic and essential findings, we submit, very respectfully, that on this question, either in conjunction with other grounds or alone, the judgment should be reversed.

C.

THE PROCEDURE OF THE RAILROAD COMMISSION CONSTITUTED A DENIAL OF DUE PROCESS OF LAW BECAUSE THE COMMISSION FAILED TO FOLLOW THE PRESENTLY EFFECTIVE RATE-MAKING RULE OR STANDARD PRESCRIBED BY THE LEGISLATURE OF CALIFORNIA FOR APPLICATION TO TOLL-BRIDGE COMPANIES.

This point is developed on pages 100 to 111 of our opening brief.

We there showed that the provisions of Sections 2845 and 2846 of the Political Code, on which we rely, have never been repealed. We believe that said provisions, when read into our contract, are the language of *contract*. If not, they are the language of *regulation* and as such constitute the unrepealed, presently effective legislative rule or standard of reasonableness of rates applicable to toll bridges in California.

In that event, it was the duty of the Railroad Commission to follow and apply that rule to the tolls of the Carquinez Bridge.

The Railroad Commission failed in that duty because it undertook to reduce the tolls notwithstanding the fact that the Commission found that said tolls have never yielded and do not now yield a return anywhere near as high at 15 per cent.

The Railroad Commission's failure to follow and apply said legislative rule or standard of rate making constitutes, under the decisions of this Court, denial of procedural due process of law (Opening Brief, pp. 106-111).

What do appellees say on this issue? Nothing at all.

What they could reasonably have said, we do not know. In any event, they let the issue go by default.

We are satisfied that this is the third absolutely sound point as to denial of procedural due process raised by us and that on this point, as well as on the prior two, the judgment should be reversed.

D.

EXCLUSION OF THE ANTIOCH BRIDGE. THE PROCEDURE OF THE RAILROAD COMMISSION CONSTITUTED A DENIAL OF DUE PROCESS OF LAW BECAUSE THE COMMISSION UNFAIRLY, UNJUSTLY AND ARBITRARILY SEVERED THE ANTIOCH BRIDGE FROM APPELLANT'S SINGLE, UNIFIED TRANSPORTATION SYSTEM AND FIXED TOLLS FOR THE CARQUINEZ BRIDGE ALONE, NOTWITHSTANDING THE FACT THAT THE RECORD SHOWS, WITHOUT DISPUTE, THAT THE INEVITABLE EFFECT OF THE REDUCTION OF TOLLS ON THE CARQUINEZ BRIDGE WOULD, BY FORCE OF COMPETITION BETWEEN THE TWO BRIDGES, COMPEL APPELLANT TO MAKE LIKE REDUCTIONS IN THE TOLLS CHARGED ON THE ANTIOCH BRIDGE, A LOSING VENTURE, THUS ACCOMPLISHING BY INDIRECTION A RESULT WHICH THE RAILROAD COMMISSION COULD NOT ACCOMPLISH DIRECTLY.

In our opening brief (pp. 111-128), we pointed out

(1) That the Carquinez and the Antioch Bridges of appellant are component ports of the single, unified transportation system of American Toll Bridge Company;

(2) That they are located within only 25 miles of one another, serve largely the same territory at necessarily the same tolls and are distinctly competitive with one another, so that a reduction in the tolls charged by one of the bridges necessarily forces a like reduction in the tolls charged by the other bridge;

(3) That the Railroad Commission unfairly, unjustly and arbitrarily excluded the Antioch Bridge and fixed tolls for the Carquinez Bridge alone, substantially lower than it would have done if it had fixed tolls for both bridges; that the Commission's action will force appellant to make a like reduction in the tolls of the

competitive Antioch Bridge, a losing venture; and that the Commission will thus be able by indirection to bring about lower tolls than those which the Commission could have fixed directly; and

(4) That said unfair, unjust and arbitrary action of the Railroad Commission constituted, under the decisions of the Court, denial of procedural due process.

The Commission's entire handling of the Antioch Bridge matter was most unjust and constituted clear denial of that frank and fair dealing which the citizen has the right to expect from a tribunal charged with quasi-judicial functions.

What do appellees say in reply?

Conceding the *facts* to be as stated by appellant, appellees seek to defend on the ground that the existing competition "was wholly self-imposed" (Brief, p. 33). In other words, because appellant constructed and operates *both* bridges, the claim is that the Commission is justified in fixing tolls for the more profitable bridge alone, plucked out from the single, unified transportation system, and in refusing to fix tolls for the less profitable bridge!

We know of no such rule of law. The position thus taken certainly shocks one's sense of fairness.

In so holding, appellees close their eyes to the fact that these bridges were a great, pioneer enterprise, which distinctly served and do now serve the convenience of the public and that the public authorities found and declared the enterprise to be a public necessity. Appellees forget that the construction of both these bridges received the enthusiastic acclaim of the public in the neighboring sections of California and that several thousand of these people subscribe to the capital stock of what was, in effect, a community enterprise.

Appellees seem to forget the testimony of their own witness, Mr. Mitchell, who testified (R. 290-1):

> "It must be recognized that those who initiated and developed a project such as these toll bridges are entitled to be rewarded for their foresight and for the risk they have taken. *The public, having held off until the results are more or less assured, must expect to pay for the pioneering of others.*"

Appellees have apparently also overlooked the following findings made by the Board of Supervisors of Contra Costa County at the time when they granted the franchise for the construction of the Carquinez Bridge (R. 271):

> "That the expense of the erection, construction and maintenance of such a toll bridge as a free public highway is, in the opinion of the board, and this board so determines and finds, too great to justify the erection, construction and maintenance thereof by the counties of Contra Costa and Solano.
>
> "That said bridge is a public necessity. That in the opinion of the board the public good and interests require the construction of said bridge. That the public good and public necessity will be promoted by the erection, construction and maintenance of said bridge as proposed by the said Rodeo-Vallejo Ferry Company, a corporation."

After referring to these two bridges, the Supreme Court of California said (R. 131):

> "The Toll Bridge Company *purchased* and operated the competitive factors for the obvious purpose of reducing competition, and it has undoubtedly succeeded in accomplishing that end."

The Court reached this conclusion on an erroneous understanding of the *facts*. Appellant did not *purchase*

either bridge, to reduce competition or for any other purpose. *Appellant itself constructed both bridges* contemporaneously as parts of a single, unified transportation enterprise, with the approval of the public authorities.

It is, of course, true, as stated by appellees (Brief, p. 32) that the due process of law clause alone does not protect public utilities against the hazards of competition *from some other utility,* either public or private, but that principle obviously does not apply to the facts of the present case.

Referring to *Clarksburg-Columbus Short Route Bridge Co.* v. *Woodring, et al.,* 89 Fed. (2d) 788, analyzed on pages 126-7 of our opening brief, appellees say that the decision "held merely" that the owner of the competing bridge "was entitled to a hearing in any proceeding affecting its interests" (Brief, p. 33). What then? Having accorded a hearing, is the rate-fixing agency then to close its eyes to the actualities of the competitive situation and to fix rates applicable to one bridge alone on the fair value of the property and the revenues and expenses of that bridge alone?

We submit that appellees have missed the point of the case. After stating that "the underlying consideration which confronted the Secretary was *the competitive situation here involved*" (p. 793), the Court concluded as follows (p. 794):

> "'We think the lower court was in error in holding that the Secretary was not required to consider the effect of the new rates 'upon another bridge 20 miles distant'. This loses sight of the fact that these two bridges are integral parts of a single transcontinental highway, the branches thereof dividing east of the bridges and converging again west of the bridges, thus dividing the traffic, as the public may find convenient, between

the two bridges in question. It is difficult to imagine a case where a rate reduction on one instrumentality of commerce more directly affects another than in the case here presented.

"The decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion."

After having made these various defenses in justification of the Commission's failure to fix tolls for the Carquinez and the Antioch Bridges together, appellees, in their concluding paragraph on this subject (Brief, p. 34), reverse their position and say, in apparent recognition of the soundness of appellant's position, that the Commission did *say* "that consideration would be given to the effect of the rates fixed, on the company as a whole."

However, that this statement of the Commission was an inadvertence, is shown by the fact that nowhere in the Commission's entire decision is there any finding or any declaration of any fact to show that such consideration was actually given. The tolls fixed were specifically applicable to the Carquinez Bridge alone (R. 38). Testimony recited by the Commission and relating to the possibility of new tolls, referred exclusively to the Carquinez Bridge (R. 36-38). Nowhere in the decision is there any finding as to the fair value of appellant's property in *both* bridges, or the gross revenue which the new tolls would yield from *both* bridges or the operating expenses of various kinds to which *both* bridges would be subject under the new tolls. The decision was rendered in obvious complete disregard of the fact that reduced tolls on the Carquinez Bridge would inevitably force like reduced tolls on the Antioch Bridge and of the effect of such reduction on appellant's entire gross revenue and net income.

There is absolutely nothing in the decision, on which anyone can put the finger, to show that the Commission, in fact, gave any consideration to the Antioch Bridge, or, if so, what consideration. In fact, the Commission's only *action* in the matter was to the *very reverse effect when it denied appellant's motion to consolidate the hearing* in Cases 4244 and 4259, in so far as American Toll Bridge Company was concerned (R. 33-4). This motion shows on its face that it was made for the very purpose of having both bridges considered together and having tolls fixed for *both* bridges (R. 203-206).

We respectfully submit that the mere fact that no case exactly like this one on its *facts* has heretofore come before this Court, is not determinative of the matter. The *principle* on which we rely is *the broad principle of fairness and justice* which underlies the requirements of procedural due process and which has been applied by this Court to the varying facts of many different situations, some of which are pointed out in our opening brief (pp. 73-75, 120).

Was the Commission's action in excluding the Antioch Bridge fair and just? Or was it unfair, unjust and arbitrary?

We submit, very respectfully, that the Railroad Commission's exclusion of the Antioch Bridge was an unfair, unjust and arbitrary abuse of discretion in determining the proper unit for the rate base and constituted patent denial of procedural due process of law.

This is the *fourth* respect in which the Commission's procedure constituted denial of procedural due process. We submit that on each of these four grounds the judgment should be reversed if the Court should find it necessary or desirable to go beyond the issue of the impairment of contract obligations.

III.

Due Process—Confiscation.

A.

THE RAILROAD COMMISSION'S ORDER CONFISCATED APPELLANT'S PROPERTY IN THE CARQUINEZ BRIDGE BECAUSE IT FAILED TO ACCORD A FAIR RETURN ON FAIR VALUE.

Turning, finally, to the issue of confiscation, and, first, as to the Carquinez Bridge alone, we found ourselves considerably embarrassed and impeded by reason of the Railroad Commission's failure to make the basic and essential findings which are necessary under the requirements of procedural due process of law. This is a matter on which we have already commented.

However, we have done our best, under the circumstances, and have analyzed the facts in appropriate detail on pages 129 to 174 of our opening brief.

In so doing, we have, in order to be fair, resolved important doubts against ourselves. As a *minimum* fair value or rate base, we took the lowest reliable figure shown by the evidence. The gross revenues and the operating expenses, including ordinary expenses of operation and maintenance, taxes of various kinds, depreciation and depletion, we computed from the *tolls actually established.* Prior to the decision, there was no inkling as to what those tolls would be. Appellees concede, in their brief, that, with only three exceptions, our figures are fair and accurate and may be accepted.

On the *minimum* fair value of the Carquinez Bridge alone, we find that the new tolls would yield a return of only 6.6 per cent.

On the very unusual facts of the present case, including the great hazards of construction and traffic, and the necessarily high cost of the money invested in the

enterprise, we urge that such return would be confiscatory, for the reason that a return of only 6.6 per cent on a *minimum* fair value of the Carquinez Bridge would be

—less than the return of 7.5 per cent which the Commission found that the Company should receive (R. 38);

—less than the actual cost in 1938 of all the money in the project, determined to be 7.851 per cent (Ready, Exh. 129, R. 476, 480);

—less than the cost of money in connection with the original bond issue of 1925, determined by Mr. Coleman and Mr. Ready to be 9.71 per cent (Coleman, Exh. 1, R. 209, 222; Ready, Exh. 129, R. 476, 477);

—less than the cost of money in connection with the refunding bond issue of 1935, determined to be 8.95 per cent (Ready, Exh. 129, R. 476, 478);

—far less than would result from the Commission's usual policy of ascertaining the rate of return by applying a multiple to the cost of money (Ready, Exh. 129, R. 476, 479-80); and

—substantially less than the rates of return which the Federal courts have generally required to avoid confiscation in cases of small and hazardous enterprises (Opening Brief, pp. 164-169).

We shall now address ourselves to the brief of appellees on this issue.

On page 35 of their brief, appellees refer to the figure of $8,632,622.46 as being *the* rate base claimed by appellant. That is the *minimum* fair value or rate base claimed by appellant in view of the Commission's failure to find a fair value or a proper rate base.

On the same page, appellees say that the Commission's order fixes rates "upon a base of $7,949,954.00." There is nothing in the Commission's decision to jus-

tify that statement. As we have repeatedly pointed out, the Commission made no finding as to fair value, or a proper rate base.

While the Commission *narrated evidence* as to certain figures bearing on cost or value (R. 37), including testimony that the original cost of the Carquinez Bridge was $7,949,954.00, there was *no finding* (as distinguished from a mere narration or recital of evidence) that said figure was really the original cost. In fact, the Commission said that there were included in the book costs items not specified which appeared to be more properly chargeable to other than capital accounts, as well as other unidentified items as to which no information was available (R. 37). There is nothing to show whether the Commission finally decided to deduct any of these items, and, if so, which of them and in what amounts, in order to determine even "original cost" or "book cost."

And the decision is absolutely bare of any figure which the Commission found to be fair value or a proper rate base. Said figure of $7,949,954.00 is merely *counsel's* figure, taken after the event. *It is not a finding by the Commission.*

On page 36 of their brief, appellees quote from the testimony of appellant's witness, Mr. Lester S. Ready, for many years the Commission's chief engineer. The inference in the comment of appellees that Mr. Ready testified as to the book cost as being "a reasonable rate base" is entirely without justification. In fact, in Exhibit 117 (R. 411, col. 2), Mr. Ready showed that it would be necessary to make certain additions to said figure of $7,949,954.00, bringing it up to $8,332,622.46, even before any consideration was given to the value of the property as a going concern.

The quotation from Mr. Ready's testimony appearing on page 36 of the brief of appellees relates to Mr. Ready's Exhibits 132 and 134. In those exhibits, prepared for the purpose of testing the rate of return which would be yielded by the rates heretofore in effect (Exh. 132), and by a rate of 50 cents suggested by one of the witnesses (Exh. 134), Mr. Ready used as a rate base the original cost, before any of the necessary adjustments were made therein. Mr. Ready testified that he was using this figure as "the lowest figure that reasonably could be applied to the property," and also that he was using it as a matter of convenience because he was going back to the beginning of the property as well as forward to 1948, and that the book cost was the easiest figure to use because it could be used "without making numerous adjustments."

But at no time did Mr. Ready testify that said figure was fair value or a proper rate base. In fact, he testified that the figure should be increased to $8,332,622.46 (R. 411, col. 2) to include an additional necessary allowance for interest during construction and also that an additional allowance of between $250,000 and $300,000 should be made as representing the fair value of the franchise of the Rodeo-Vallejo Ferry Company, acquired by appellant (R. 471-4).

As the results of Exhibits 132 and 134 showed an accumulated deficit in 1948 for both bridges amounting to $745,826 under existing tolls (R. 495, last column), and to $3,996,962 under the 50 cent toll suggested by one of the witnesses (R. 506 C, last column), it was obviously not necessary to pursue the subject further and to make the necessary additions to book cost.

Appellant has never claimed and does not now claim that the figure of $7,949,954 used by counsel for appel-

lees is fair value or a proper rate base. Obviously, it is substantially too low.

On page 37 of their brief, appellees state that "there is not a line of evidence respecting the measure or even the existence of going concern value." When we shortly discuss the subject of "going concern value," we shall show that this claim is devoid of merit.

On page 37 of their brief, appellees claim that appellant has at no time "made and pressed a claim for the acceptance of any higher value" than $7,949,954. That this claim is without merit is shown by the fact that at all times following the Commission's decision, appellant has claimed that a *minimum* fair value of the Carquinez Bridge is $8,632,622.

Appellant made that claim in its Petition for Rehearing before the Railroad Commission (R. 54); in its briefs and argument before the Supreme Court of California (R. 136); in its Petition for Rehearing before the Supreme Court of California (R. 163-175); and in its Opening Brief herein (pp. 144-5).

The suggestion appearing on page 37 of the brief for appellees that there is a variance between the representations made by appellant bfore the Commission and those now made before this Court is entirely without foundation.

On page 37 of their brief, appellees further say: "True, the Commission did not expressly find that the value or base taken was considerd reasonable, * * *."

We go further and point out, again, that the Commission did not expressly or at all find any value or base.

Opposite page 38 of their brief, appellees set forth a tabulation entitled: "Carquinez Bridge—estimated future traffic, rate base, operating revenues, expenses and return."

This tabulation does not contain any *findings* made by the Commission, but is merely a tabulation prepared by *counsel* for appellees *subsequent to the decision,* and principally from figures supplied by appellant.

The first column shows appellant's analysis of the effect of the Commission's decision if applied to the 1938 business, and show a return of only 6.6 per cent on minimum fair value or rate base.

Each subsequent column shows a return computed on a base of only $7,949,537, being a figure assumed by counsel for appellees and being far below what we claim to be fair value or a proper rate base.

The columns for the years 1938 to 1943, inclusive, are computed on a toll of 50 cents, which was suggested by one of the witnesses but was not established by the Commission. In other words, the only column which uses the tolls actually established by the Commission is the first column.

It is clear that even at the low rate base used by counsel, the rate of return for each of the years 1938 to 1943, inclusive, is substantially less than the cost of money in connection with the original bond issue of 1925, hereinafter found to be 9.71 per cent, and also below the cost of money in connection with the refunding bond issue of 1935, hereinafter found to be 8.95 per cent.

We do not believe that further comment on the tabulation would be warranted.

On page 38 of their brief, appellees refer to a paragraph from the Commission's decision, quoted by us on page 92 of our opening brief. This paragraph narrates some of the *evidence* contained in Mr. Ready's Exhibit 134, but fails to follow the exhibit through. The Commission apparently thought that the amount of money required for payment of Federal income and

State franchise taxes in 1938 would be the amount to be paid in *1939*—a patently erroneous conclusion.

Of said paragraph thus quoted, we may say,

(1) The paragraph merely narrates or recites evidence but makes no findings of fact;

(2) Even in its recitation of evidence, the paragraph refers to results based on a 50 cent toll *which was not established by the Commission.* Nowhere in this paragraph, nor anywhere else in its decision, did the Commission make any finding as to the number of dollars of gross revenue or of operating expense which would or might be expected to result from the tolls actually established by the Commission.

The percentage figure of 7.42, appearing on page 38 of the brief for appellees, is merely a figure of counsel for appellees made in the absence of the basic and essential findings which the Commission should have made in order to avoid denial of procedural due process.

On page 39 of their brief, appellees say that on the issue of confiscation of the Carquinez Bridge property there are only three points of difference between appellant and the Commission. But there is no way of telling what the Commission did as to any of these three matters, except that the Commission obviously did not value the property as a going concern. It would have been more accurate to say that *counsel for appellees* are now willing to accept appellant's figures with the three exceptions named by them. We shall now consider each of said three exceptions.

On page 39 of their brief, appellees refer to "the rate base taken by the Commission." Constant iteration and reiteration by counsel, after the event, of what is not a fact, does not make it a fact. The decision does not show that the Commission found or took any rate base, or, if so, what it was.

Turning now to the subject of interest during construction, appellees concede (Brief, p. 40) that their assumed figure of $7,949,954 includes only $688,092 for that item. Said sum of $688,092 constitutes interest during construction on only that portion of the construction capital which appellant secured from the sale of *bonds* in 1925. The figure contains nothing for interest during construction on that part of the construction capital which was secured by the Company from the sale of its *capital stock*, or from *any other source* than from the sale of bonds (Ready, R. 521).

Both Mr. Mitchell, witness for the Commission, and Mr. Ready, witness for appellant, agreed that interest during construction must be computed on the *entire* construction capital. Mr. Mitchell testified that the amount should be $1,103,634 (Mitchell, R. 320; Exh. 16, R. 247, 257, col. 3). In order to be fair, we are willing to accept Mr. Ready's lower figure.

The desire of counsel for appellees to limit the allowance to $688,092 is contrary to the undisputed testimony of the witness for *both* the Commission and appellant, and does not, in our opinion, require further consideration.

On page 40 of their brief, appellees, after discussion of the subject of interest during construction, say: "It (the assumed rate base) includes *other* overhead or indirect charges additional to the cost of the physical structure totalling fully $2,000,000, or about 35 per cent."

The quoted language relates to an estimate of the witness Mitchell, and may be misleading, because said sum of $2,000,000 actually *includes* the allowance for interest during construction and is not confined to *other* overhead charges (Exh. 16, R. 247, 257, bottom of page, col. 1).

On page 40 of the brief for appellees, appears a short paragraph on the subject of going concern value. Appellees say that our request for an allowance for that item "is without any evidentiary basis whatever." This statement is not supported by the evidence. Mr. Ready's Exhibit 132 (R. 491, 493, 494, 495) contains an absolutely complete statement of all receipts and expenditures of the Company from the very beginning as to the Carquinez Bridge alone, and the Antioch Bridge alone and American Toll Bridge Company as a whole, from which figures the cost of developing the business can be ascertained with a completeness and certainty seldom found in a public utility rate case.

Furthermore, Mr. Ready presented an exhibit and testified fully with reference to the fair value (between $250,000 and $300,000) of the franchise of Rodeo-Vallejo Ferry Company acquired by appellant and clearly constituting an element of going value (R. 471-4). Reference to additional testimony will be unnecessary.

The allowance claimed by appellant for this element of value is most reasonable (Opening Brief, pp. 136-143).

There is nothing in the Commission's decision to show that appellant's property was valued "as a going concern." The subject is not once mentioned in the decision. It now appears from the brief for appellees (p. 40) that it is their position that no allowance should be made for going concern value. They defend the Commission's refusal to so value the property. In this, there was fundamental error of law.

Turning now to operating revenues to be yielded by the Commission's tolls, counsel seems to accept our figures (Opening Brief, p. 148) as correct.

Referring now to operating expenses, counsel accept all of our figures (Opening Brief, p. 148) except that they assume as money to be paid for Federal income taxes in 1938, moneys which will actually be paid not in that year, but in 1939. As we showed in our opening brief (pp. 149-50), this contention lacks merit.

This is a *rate case,* not an *accounting problem.* The Commission has never prescribed a system of accounting for toll bridge companies.

Our method of handling the matter is in accord with the actual accounting practice of appellant from the very beginning (R. 524).

No witness testified on the subject other than Mr. Ready, and our position is in accordance with his exhibits and testimony (Exhs. 132, 134, R. 491, 505; R. 524).

The claim now made by counsel for appellees is without support in the record and is directly contrary to the only testimony and exhibits on the subject. We submit that appellees are bound by the undisputed testimony.

It thus appears that the rates fixed by the Commission will yield on a *minimum* fair value or rate base of the Carquinez Bridge a return of 6.6 per cent, and no more. The figure of 7.25 per cent appearing on page 41 of the brief for appellees is the figure of counsel for appellees based on the above erroneous handling of Federal income taxes in 1938, and may be disregarded.

We are thus confronted with two remaining questions of fact.

What was the cost of money on this hazardous and difficult enterprise? and

What is the relationship between that cost of money and a fair rate of return?

The first question was exhaustively reviewed by us in our opening brief (pp. 151-8). We showed the following costs (Opening Brief, p. 172):

Actual cost in 1938 of all the money in the project, 7.851 per cent;

Cost of money in connection with the original bond issue of 1925, 9.71 per cent; and

Cost of money in connection with the refunding bond issue of 1935, 8.95 per cent.

What do appellees say?

Referring first to the cost of money in connection with the original bonds issued in 1925, counsel would eliminate 565,000 shares of stock which were necessarily issued by appellant in order to make possible the sale of its bonds. (Brief, p. 43.) If these shares had not been issued, it would have been impossible to sell the bonds at all, or the increased interest and discount would have been such as to bring about an equivalently higher cost of money. This stock is clearly a part of the cost of the bond money.

The facts are set forth in Exhibit 1 of Mr. Coleman, the Commission's own witness (R. 221-2), and in Exhibit 129 of Mr. Ready (R. 476-7). Both witnesses agreed as to the facts and as to the necessity of including this stock in computing the cost of the bond money.

Testifying on this subject, Mr. Coleman, the Commission's witness, said (R. 340):

"Q. (by Mr. Thelen): Now, on page 16 I find, Mr. Coleman, that you have set forth near the top of the page, in connection with stock financing, an item of $800,000 representing stock issued to the purchasers of the bonds?

"A. (by Mr. Coleman): Yes, sir, that stock was issued to the underwriters of the bonds, who were the purchasers, of course.

"Q. As I understand it, it was 500,000 shares shown on the books at $1.60, making a total of $800,000?

"A. That is correct.

"Q. I imagine that while you were examining the Company's records you found the contract, did you not, which provided for the issue of that stock?

"A. Yes, sir.

"Q. And you haven't any doubt, Mr. Coleman, have you, that the stock was actually issued?

"A. No, I have no doubt.

"Q. And I suppose you are expressing no opinion as to whether it was necessarily issued or not?

"A. Well, there seemed to be a necessity, as I gathered; the underwriters wouldn't take the bonds unless they were also given that stock."

Subsequently, there occurred the following further colloquy between Mr. Thelen and Mr. Coleman (R. 341-2):

"Q. (by Mr. Thelen): You have made a very careful analysis of the cost of money, Mr. Coleman, and I would like to ask you a few questions on that subject beginning with page 17. As I understand it, on page 17 you refer to the original bond issues as distinguished from the refinancing in 1935?

"A. (by Mr. Coleman): Yes, sir.

"Q. Now, am I correct in assuming that you have ascertained that, as far as the original bond issues were concerned, the cost of the bond money on the straight line basis was 9.42 per cent?

"A. That is the figure I obtained, if my arithmetic is correct.

"Q. I certainly would not challenge your arithmetic, Mr. Coleman, so we will assume that is correct. And if we include also certain items totaling $116,639 which might properly be considered as bond expense, the cost

of money would be raised a little, to 9.71 per cent on the straight line basis?

"A. Yes, sir. That includes, of course, the amortization of the bonus stock."

Counsel's contention is thus contrary to the undisputed testimony, including that of the Commission's own witness, Mr. Coleman. Said contention must, accordingly, be disregarded.

Mr. Coleman and Mr. Ready were correct in agreeing and testifying that the cost of money in connection with the original bond issue of 1925, with amortization on the straight line basis, was 9.71 per cent.

Turning next to the cost of money in connection with the refunding bond issue of 1935, that cost, with amortization on the sinking fund basis, the lower one of the two bases, was 8.95 per cent. The details appear in Mr. Ready's Exhibit 129 (R. 476, 477-8).

In the brief for appellees (p. 44), counsel set forth a computation to show that this cost was only 6.78 per cent. However, that computation is clearly erroneous for each of the following two reasons:

(1) It left out entirely the *premiums* amounting to $131,300 necessarily paid by appellant on the retirement of the bonds called in 1935 (R. 478). The correction of this error will raise said 6.78 per cent to ~~7.95~~ 7.57 per cent.

(2) It also left out entirely *the unamortized discount and expenses incurred in connection with the issue of the original bonds in 1925 and still remaining unamortized in 1935,* amounting in 1935 to $440,521.88 (R. 476, 478). The correction of this error will raise said ~~7.95~~ 7.57 per cent to 8.95 per cent, being the correct figure, with amortization on the sinking fund basis (R. 478).

The statement in the brief for appellees (p. 44) that by 1935 appellant had written off all the stock issued in connection with the original bonds of 1925, is inaccurate. What appellant had done was to write off, by 1935, $1,149,791 out of the $1,590,492 (R. 477) of the discount and expenses in connection with the original bond issue, leaving, however, $440,521.88 (R. 478) still to be written off. There is nothing to show that in writing off said discount and expenses, appellant first wrote off said stock. There is not an iota of evidence to support such claim. Of course, if that had been the case, there would be even less argument to support counsel's effort to disregard the $440,521.88 of unamortized discount and expenses still remaining in 1935.

We submit that the above errors in the computation of counsel are patent and that the undisputed testimony shows that the cost of money in connection with the refunding bond issue of 1925 was, with amortization on the sinking fund basis, 8.95 per cent (R. 478).

To the undisputed evidence (Exh. 129, R. 476, 480, col. 4) that, as of 1938, the average composite cost of *all* the money from bonds, stocks or in the depreciation reserve, was 7.851 per cent, appellees make no response in their brief.

We now address ourselves to the one remaining question of fact under this issue, which is the relationship between the *cost of money* to appellant and a *fair rate of return.*

We developed this subject fully on pages 158 to 164 of our opening brief. As we there showed, by copious references to decisions of the Railroad Commission, as referred to and tabulated in Mr. Ready's Exhibit 129 (R. 476, 478-83), it has been and is the Railroad Commission's established policy to allow a rate of return

somewhat in excess of the cost of the money invested in a public utility property.

In the case of large and well established utilities, the rate of return allowed has averaged 1.15 times the weighted average cost of money to said utilities, figuring bond discount and expenses on the sinking fund basis. In the case of more hazardous utilities, such as natural gas companies, the multiple has run as high as 1.28 (Opening Brief, p. 161; R. 479, 480). If said smaller multiple of 1.15 is applied to the average cost of *all* appellants' invested money in 1938, found to be 7.815 per cent, the resulting fair rate of return, on this basis, would be 9.029 per cent (Exh. 129, R. 476, 480, last col.). Mr. Ready testified that a fair return to be allowed in this case throughout the life of the franchise would be 9 per cent (R. 490), and his testimony is the only testimony on that subject in the record.

On this subject, the brief for appellees contains only one paragraph. On page 42, counsel say that it has been the Commission's policy to provide a rate of return so that the interest return on *all* capital shall equal the interest rate which the utility must pay currently on *borrowed* money, bearing *fixed interest charges* (*i.e.*, bonds). If that statement means that the capital represented by the proceeds from the sale of capital stock, especially in a hazardous enterprise, must be content with a return, years later, equivalent to the low interest rate which the company may enjoy *on a small bond issue* to refund what is remaining of a large original bond issue, the Commission is establishing a new policy which is obviously unfair to the stockholders. There is nothing in the record to justify said statement in the brief for appellees, and no decision of the Commission is cited in support thereof.

Even that policy, however, when the cost of the refunding bond issue of 1935 is correctly computed, would result in a rate of return of at least 8.95 per cent, as compared with our claim of 9 per cent.

We respectfully submit that in the light of the specific facts of this particular case, a return of less than 9 per cent, particularly a return of only 6.6 per cent on a *minimum* fair value or proper rate base of the Carquinez Bridge is clearly confiscatory.

B.

THE RAILROAD COMMISSION'S ORDER CONFISCATED APPELLANT'S PROPERTY IN BOTH THE CARQUINEZ AND THE ANTIOCH BRIDGES BECAUSE IT FAILED TO ACCORD A FAIR RETURN ON FAIR VALUE.

Considering the Carquinez and the Antioch Bridges together, as parts of a single, unified enterprise, we showed on pages 174 to 178 of our opening brief that the tolls fixed by the Commission, when charged by both bridges, will produce a return of only 5.6 per cent on a *minimum* fair value of $10,780,411.

Said figure of $10,780,411 is the *lowest* of the three figures shown by the record as being applicable to this situation (Opening Brief, pp. 174-5). That, on the specific facts of this particular case, a return of only 5.6 per cent would be confiscatory, can hardly be gainsaid.

On this entire subject, the brief for appellees contains only the following sentence (p. 45): "It might be demonstrated by the very figures presented by appellant in its brief that its income from both bridges will yield in excess of 6.8 per cent, not merely 5.6 per cent as it asserts."

However, counsel do not undertake to make any such demonstration and we are satisfied that it could not correctly be done.

Our own figures are set out in complete detail in our opening brief (pp. 176-7).

From the conclusion that these figures show confiscation, we see no escape.

We submit that it is too clear for further analysis that, because of the confiscatory effect of the Commission's order when applied, as it fairly must be, to *both* the Carquinez and the Antioch Bridges, the judgment of the Supreme Court of California must be reversed.

C.

THE RAILROAD COMMISSION'S ORDER CONFISCATED APPELLANT'S PROPERTY IN BOTH BRIDGES, FOR THE FURTHER REASON THAT IT FAILED TO RECOGNIZE AND GIVE EFFECT TO THE RIGHTS OF APPELLANT IN ITS WASTING ASSETS, NAMELY, THE CARQUINEZ AND ANTIOCH BRIDGES, THE TITLE TO BOTH OF WHICH BRIDGES WILL PASS TO THE ADJACENT COUNTIES ON THE EXPIRATION IN 1948 OF THE FRANCHISES GRANTED BY SAID COUNTIES FOR THE CONSTRUCTION AND OPERATION OF SAID TWO BRIDGES.

In our opening brief, on the subject of *wasting assets*, we first pointed out that it is well established that a public utility which owns and operates a wasting asset is entitled to receive rates sufficiently high so that, in addition to being able to pay its expenses of operation, maintenance and taxes, and receive a fair return, it will also be able to take care of both *depreciation* and *depletion*. Leading decisions establishing that principle are cited (Opening Brief, pp. 179-183).

We then pointed out that the Railroad Commission failed to apply the law of wasting assets (Opening Brief, pp. 183-5).

Next, we pointed out that the Railroad Commission made *no finding* as to the amount to be allowed for

either depreciation or depletion (Opening Brief, p. 185).

In their brief herein, appellees say that the latter statement is "false" (Brief, p. 45). This is an unfortunate statement which appellees cannot support. Nowhere in the Railroad Commission's decision is there any finding whatever as to how many dollars should be allowed and were being allowed for 1938 or for any subsequent year, whether for depreciation or for depletion.

Appellees support their statement (Brief, pp. 45-6) by a reference to Exhibit 134. That exhibit was not even introduced by a witness for the Commission. It was introduced by Mr. Ready, one of *appellant's* witnesses. Not by the widest stretch of the imagination can Exhibit 134 be construed to be a *finding of fact by the Commission.*

Appellees (Brief, p. 46) then quote Mr. Ready's testimony as to what *he* did in computing amortization in one of *his* exhibits. As though that were a *finding by the Commission!*

It is perfectly obvious from a reading of the Commission's decision that when appellant said that the Railroad Commission made no finding as to the amount to be allowed for either depreciation or depletion, appellant told the exact truth.

In its opening brief, appellant next attached as Appendix No. 3, an exhibit entitled "Estimated Operating Results—American Toll Bridge Company—1938-1948—Under Rates as per CRC Decision."

The exhibit was prepared for the purpose of determining whether or not the tolls established by the Commission will enable appellant to meet its obligations to its bondholders and its stockholders by the time the property in the bridges passes to the adjacent counties

in 1948. The items for "bond interest and bond retirement" are the actual requirements under the Company's bond mortgage. The money remaining at the end of each year, after the other obligations to the Company's bondholders and stockholders have been met, is simply used to retire capital stock at $1.00 per share.

The exhibit shows that at the end of the franchise period in 1948, the revenues from the rates now fixed by the Commission will have failed to retire 437,167 shares of stock of the par value of $1.00 per share.

The exhibit further shows that said revenues will have failed to apply as much as a single dollar on the $2,404,600 of the dividend at 8 per cent which the Company failed to earn and declare during the period from May 21, 1927, to December 31, 1935. Said figure of $2,404,600 includes nothing whatever for interest on deferred payments.

Finally, the exhibit shows unretired capital stock at $1.00 per share, plus unpaid dividends at the end of the franchise period, totalling $2,841,767.

Appellees do not challenge the accuracy of any figure appearing in this exhibit. The Court may, accordingly, accept all of the figures. Neither do appellees challenge the accuracy of the conclusions reached, which conclusions the Court may likewise accept with safety. In other words, the exhibit concededly speaks the truth.

Then what do appellees say as to this exhibit?

First, they say that what appellant seeks "is the making good of such asserted deficiency, *as well as* to set aside enough to fully retire the bridge investment" (Brief, p. 46). In making this statement, appellees are in error. What appellant seeks is sufficient tolls so that it may, by 1948, completely meet its obligations to its bondholders and its stockholders *or* so that it may, after paying its expenses and receiving a fair return, retire

its investment (*i. e.*, the money invested in the enterprise) by 1948. These matters are fairly equivalent to one another, but they are alternative and not additive. The tolls established by the Commission will not enable appellant to do either of these things (Appendix No. 3 and No. 4 to Opening Brief).

Appellees then say (Brief, p. 46): "It (the Company) does not reveal that out of earnings and out of its depreciation reserve it had, by August 1, 1937, reduced its bonded debt to $3,544,000 (R. 212) or that it had seen fit to reacquire for cash a considerable amount of its own stock (R. 220), or to invest cash in the purchase of ferry properties (R. 212)."

We regret that appellees should make such statements. The matters which appellees say we have not revealed are all set forth in our Exhibit 116, introduced by Mr. J. Wilbur Haines, appellant's witness, and were by us made a part of the Transcript of Record herein. We are not concealing anything. In fact, the record which we have made in this case, giving the complete operating revenues and expenses, in all appropriate detail, for each year from the beginning until 1937 (Exh. 132, R. 491, 493, 494, 495), together with complete estimates for each of the years from 1938 to 1948, inclusive (Exh. 132 and Exh. 134, R. 491, 505), are among the most complete showings that have ever come to our attention in any public utility rate case.

Furthermore, the reduction of appellant's bonded debt and the retirement of its capital stock, by 1948, is the very thing which appellant must urgently insists on the right to do. What it has already done along this line, although insufficient to date, is exactly what appellant should be doing.

Finally, appellees say (Brief, p. 46): *"It seems obvious enough, therefore, that no matter how the stock*

holders of the corporation may ultimately fare, any deficency in their dividends to date does not, of itself, evidence confiscatory earnings from the bridge property."

Appellees thus express the following two thoughts:

First, they show that they are not interested in how the stockholders may ultimately fare. That is exactly the position taken by the Commission in its decision. We feel that we have a just right to complain of that position.

Second, any deficiency in dividends merely *to date,* does not of itself evidence confiscation. We have not so claimed. If we are permitted to make sufficient earnings hereafter, we hope to be able to make good our unfulfilled obligations to our stockholders. What we have urged, and what we now must earnestly urge, is that we be permitted earnings sufficient so that by 1948 we shall have been able to meet our obligations to our bondholders and our stockholders.

The reduction of our tolls so as to make it impossible for us to meet those obligations will, we insist, constitute confiscation. And that is exactly what the reduced tolls now established by the Commission will do, as we have shown by the concededly correct figures which appear in said Appendix No. 2.

In our opening brief, we then approach the subject of *wasting assets* from a somewhat different angle, which, however, leads to the same conclusion. Leaving the field of stocks and bonds, we turn to the field of the *investment.* We turn to the number of dollars of money which were actually used in the construction of the two bridges, from whatever source the money may have been derived. Our problem is to determine whether the tolls heretofore charged, plus the reduced tolls now

established by the Commission, will yield sufficient rev-
enue to enable the Company to pay all proper expense
and a fair return on the unretired investment remain-
ing, year by year, and retire said actual investment by
1948.

For a more detailed statement of the method used
the Court is respectfully referred to pages 193-196 o
our opening brief.

Attached to our opening brief as Appendix No. 4, i
a tabulation entitled: "Wasting Assets—America
Toll Bridge Company—Effect of Rates Prescribed b
Railroad Commission on Company's Ability to Retir
the Investment." By looking at the last figure in col
umn 11, the Court will observe that, after making ap
propriate allowances for operating expenses, Federa
and State income taxes and a return of only 8 per cen
per annum *on the unretired portion of the investmen
year by year, the tolls in effect prior to 1938, plus thos
established by the Commission for the remaining year
will have failed to supply $2,663,766 of the funds nece
sary to retire the investment by 1948.*

By looking at the last figure in column 7, the Cour
will note that if the rate of return of 9 per cent is taken
said tolls will have failed, in a much larger sum, to sup
ply the necessary funds for the retirement of the in
vestment by 1948.

What do appellees say in reply to this showing o
"the retirement of the investment" by 1948? Nothin
at all.

Appellees have made no challenge of the accuracy o
any figure in said exhibit nor do we understand ho
they could reasonably do so.

Nor do we know how appellees could hope to cha
lenge successfully the methods used in the exhibit.

The "stock and bond" exhibit (Appendix No. 3 to Opening Brief) and the "retirement of investment" exhibit (Appendix No. 4 to Opening Brief) are separate demonstrations along somewhat different lines, but leading to the same conclusion, namely, that the reduced tolls established by the Railroad Commission will fail in an amount in excess of $2,500,000 to enable appellant to meet its obligations as owner of its "wasting assets."

Thus, again, is confiscation clearly demonstrated.

We submit, very respectfully, that the judgment should be reversed on each of the grounds set forth in our opening brief and in this reply brief.

Dated at Washington, D. C., this 20th day of April, 1939.

Respectfully submitted,

MAX THELEN,
Attorney for Appellant.

Due service and receipt of a copy of the within Reply Brief is hereby admitted this day of April, 1939.

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Counsel for Appellees.